GOPAL KRISHNAN

v.

SYED AZMAN SYED MOHD & ANOR.

HIGH COURT MALAYA, IPOH
ABDUL MALEK AHMAD J
[CIVIL PROCEEDINGS NO. 134 OF 1984]
29 NOVEMBER 1990

CONTRACT: *Agreement for sale and purchase - Plea of non est factum - Fraud and misrepresentation - Terms of contract - Failure to evict squatters - Failure to service bank interest - Non est factum not specifically pleaded - No evidence of fraudulent transfer - Whether acted with reasonable care - Damages not proved.*

The plaintiff G was the owner of a piece of the land and on 7 March 1979, G and the second defendant D2 had signed an agreement for the joint development of the land. The first defendant D1 was the solicitor who acted for both G and D2. G signed some documents in D2's office in the presence of D1 and MWB, a director and officer of D2. G contends that the defendants had fraudulently misrepresented to him the legal implications of the document which in effect transferred the said land to D2. He based this contention on the fact that the documents were in English and Bahasa Malaysia, both being languages which he claimed he did not understand.

G sought recovery of all documents which he had signed including the revocation of the power of attorney signed by him, and an order for the transfer of the said land to him.

The defendants denied G's allegations and counterclaimed for damages for breach of the sale and purchase agreement.

Held:

[1] It was clear from the facts that G had been in breach of the joint-venture agreement as he had failed to evict the squatters from the land within 6 months and had failed to service the bank interest on the overdraft facility given to him. He had realised that he could not continue with the project and being unable to pay back the loan, as evidenced by his letters seeking more time to pay, he decided to transfer the said land to D2.

[2] G's letter to transfer the said land to D2 had been made after G had engaged the services of and obtained independent advice from another firm of solicitors; as G had prior to this executed a sale and purchase agreement and the transfer form for another piece of land, he cannot be said to be wholly unfamiliar with these documents.

[3] There was nothing in the evidence to suggest that D1 had fraudulently transferred G's land to D2 by causing G to sign a document which later turned out to be a transfer document or that G was induced by the defendants to accept a variation of the original contract.

[4] As the plea of *non est factum* had not been pleaded specifically by G, the Court is not bound to consider it; however as G had raised it in his testimony, the Court considered it and held that G had failed to state that he had acted with reasonable care. In the circumstances, he was bound by the written contract entered into by him in the absence of fraud or misrepresentation. As fraud had never been proved on the part of the defendant, G's claim was dismissed.

[5] The counterclaim by the defendant was also dismissed as the damages had not been proved to the satisfaction of the Court and as the said land had been transferred by G to D2 as a result of the breach by G, D2 had been fully compensated by G's breach.

[Plaintiff's claim and defendants' counterclaim dismissed; each party to bear their own costs.]

Cases referred to:

Tan Chye Chew & Anor. v. Eastern Mining and Metals Co. Ltd. [1965] 1 MLJ 201 ***(foll)***

Saunders (Executrix of the Estate of Rose Maud Gallie - Deceased) v. Anglia Building Society (Formerly Northampton Town and Country Building Society) [1970] 3 All ER 961 ***(foll)***

Subramaniam v. Retnam [1966] 1 MLJ 172 ***(foll)***

For the Plaintiff - Clarence Wilfred; M/s Wilfred & Co.

For the Defendants - Ranjit Singh; M/s Ranjit Singh & Co., Kerpal Singh; M/s Azman, Davidson & Co.

JUDGMENT

Abdul Malek Ahmad J:

In his amended statement of claim, the plaintiff had pleaded that he was the owner of a piece of land held under EMR No. 175 for Lot No. 1403 in the Mukim of Sungei Siput in the District of Kuala Kangsar [hereinafter "the said land"] comprising 2 acres 1 rood and 27 poles. On 7 March 1979, the plaintiff and the second defendant had signed an agreement for the joint development of the said land and that the first defendant, as solicitor for both the plaintiff and the second defendant, was at all times aware of the nature of the transaction, the value of the land and the terms of the agreement. Under the agreement, the two parties were to develop the said land in accordance with a proposed plan and that the plaintiff would have 25 units of every 100 units of shophouses and 20 units of every 100 units of terrace houses built.

Sometime in 1981, the plaintiff signed some documents in the office of the first defendant in the presence of the first defendant and Mok Wooi Beng, a director and officer of the second defendant. According to the plaintiff, the documents were in both English and Malay languages which he did not understand and both the defendants had fraudulently misrepresented the legal implications contained therein which had the effect of the plaintiff transferring the said land to the second defendant. The plaintiff had further pleaded that on 20 November 1981, the second defendant had fraudulently misrepresented to the plaintiff that he was liable to pay expenses incurred for the development of the said land by the second defendant and had caused him to sign a letter agreeing to the transfer of the said land to the second defendant. Subsequently, on 31 May 1983, the two defendants had fraudulently caused the land to be transferred to the second defendant.

Particulars of the fraud committed by both defendants had been accordingly detailed and the plaintiff had prayed for the delivery up and cancellation of all documents signed by the plaintiff and in possession of both defendants, for rescission of the contract and revocation of the power of attorney signed by the plaintiff, for an order directing the second defendant to transfer the said land to the plaintiff or alternatively the Senior Assistant Registrar or the Collector is to comply with the Court order that the Register of Titles be rectified and the said land registered in the name of the plaintiff, for damages, for costs and for further or other relief.

In their statement of defence, the defendants had denied the allegations and averred that the plaintiff is an educated man with an understanding of the written English and Malay languages and had executed the documents knowing fully well the consequences of his actions including voluntarily executing the letter dated 20 January 1981 to transfer the said land to the second defendant. In addition, they had counterclaimed for loss and damages at RM650,000 for interest at 8% per annum from the damages for breach of agreement, for costs and for such further or other relief.

In his evidence, the plaintiff said he had six years of schooling, three each in a Tamil and in an English school. His Counsel had at the outset referred to Bundle B which was the plaintiff's Bundle of Documents and in response to his Counsel's question, the plaintiff had stated that he did not understand p. 2, which was the plaintiff's grant of a power of attorney to the second defendant on 8 March 1979 which was attested by the first defendant, that he had signed the memorandum of agreement between him and the second defendant at p. 16 on 7 March 1979 in front of the first defendant, and that he did not understand the letter at p. 18 which was signed by him but prepared by his friend dated 21 April 1980 addressed to the second defendant wherein the plaintiff had agreed to reimburse the second defendant RM100,000 and RM20,000 for miscellaneous expenses, if he fails to deliver vacant possession of the said land in view of the Pengarah Tanah dan Galian's letter dated 9 January 1980. As for this letter, the plaintiff had explained that he had written it as he could not pay bank interest arising from overdraft facility.

The plaintiff also denied being explained another letter at p. 20 dated 20 January 1981 addressed to the second defendant and signed by him wherein he had stated that in consideration of the RM100,000 paid by the second defendant on 6 March 1979 for the development of the said land, the plaintiff had undertaken to pay the principal and interest due to Malayan Banking Berhad on or before 31 January 1981. He had also denied undertaking to refund the RM40,000 incurred by the second defendant and that in breach of these two undertakings, he would transfer the said land to the second defendant free from any encumbrances. In his evidence, he maintained that he never wanted to sell the said property to the second defendant as they had not paid any money to buy it.

The plaintiff also gave evidence that as owner of the said land, he used to get rental of RM400 to RM500 a month but after the transfer on 31 May 1983, apart from not getting the rentals from the seven house tenants and twenty-six ground tenants except from one tenant at RM10 per month, the others had extended their houses or put up bigger buildings. He had also lost an annual income of RM400 from the felled coconut trees. Under cross-examination, the plaintiff admitted having sold other lands previously and that he had executed sale and purchase agreements and transfer forms before. As regards his letter to the first defendant dated 21 May 1981 at p. 22 of Bundle D, which is an agreed bundle, asking for time to settle the overdraft facility before the end of June 1981, he said his friend Manickam had written it on his instructions. However, he did not call Manickam to testify. He said the same for the similar letters dated 8 December 1980 at p. 19 of Bundle D which had asked for time before 31 December 1980 and at p. 12 of Bundle D dated 20 June 1980 which had asked for time "at the earliest date".

The plaintiff agreed that under clause 2 of the agreement he was to receive RM100,000 but this had been increased by the letter of guarantee dated 19 July 1980 to RM110,000. Out of the amount, he was to pay RM60,000 to Gurbaksh Singh s/o Shankar Singh in whose name the said land was charged. The balance was to remove the squatters on the said land within six months. He had signed the transfer form at p. 24 of Bundle B without knowing what he

was signing. He had thought he was signing it for the purpose of developing the said land. The first defendant, an advocate and solicitor of some standing, told the Court that the relevant agreement had been signed by both the plaintiff and the second defendant in his presence. He added that the contents were explained in Malay to the plaintiff who understood him. On receipt of the letter at p. 20 of Bundle B, he was instructed by the plaintiff and the second defendant to prepare the relevant transfer form. Again, the document was explained to the plaintiff and he signed after the explanation. The same procedure was adopted for the power of attorney from the plaintiff to the second defendant.

The first defendant had accordingly on behalf of the plaintiff written to M/s. Gurdev Singh & Co. on 16 March 1979, asking for the discharge of charge together with the document of title on the plaintiff's undertaking to pay the RM60,000 (p. 1 of Bundle D). On receipt of these documents with the reply dated 20 March 1979 (p. 2 of Bundle D), the RM60,000 had been promptly paid (p. 3 of Bundle D).

As for the grace periods to pay the interest due, the first defendant gave evidence that the plaintiff had written on 29 May 1980 (p. 10 of Bundle D), on 20 June 1980 (p. 12 of Bundle D) and on 21 May 1981 (p. 22 of Bundle D) where the plaintiff had stated that he was going to sell the land. The first defendant reiterated that for all the documents the plaintiff had signed in his presence, he had explained them in Malay before he signed and the first defendant had also insisted that the plaintiff initial each and every page.

Under cross-examination, the first defendant said he had been retained by Malayan Banking Berhad to sue the plaintiff for recovery of money but did not think that there was any conflict of interest in the circumstances as he had acted for the plaintiff in the transfer, joint venture agreement and power of attorney while he had acted for the bank only for the monies taken by the plaintiff.

The project manager of the second defendant (DW2) testified that the plaintiff was to service the interest on the overdraft but did not do so. He further stated that the plaintiff also had failed to deliver vacant possession of the said land within six months as stipulated in the agreement. As a result, the second defendant had to pay the interest arrears amounting to RM16,000 at that time. By a letter dated 21 November 1981 (p. 31 of Bundle D), the second defendant had told the bank that they were willing to service the interest as no agreement had been finalised with the plaintiff on the matter at that stage. By a registered letter dated 7 September 1982 addressed to the plaintiff (p. 35 of Bundle D), the second defendant had stated that as at 22 January 1982, apart from the RM16,000 interest, they had paid another RM112,546.75 sen on behalf of the plaintiff as against the fixed deposit. With reference to the plaintiff's letter dated 20 January 1981 (p. 20 of Bundle B), DW2 stated that the plaintiff did it voluntarily. Because of this letter, where the plaintiff willingly wanted to transfer the said land to the second defendant, they had gone to the first defendant's office to execute the transfer. As for the real property gains tax, the second defendant had paid the amount of RM9,360 due from the plaintiff and this explained why the plaintiff's address is care of the second defendant. The second defendant subsequently asked for a valuation report and the value given on 18 July 1983 was RM200,000 with a forced sale value of RM150,000.

DW2 further told the Court that the second defendant was quite prepared to return the said land to the plaintiff provided he paid RM160,000 to cover all the expenses incurred although earlier by the first defendant's letter dated 6 April 1981, they had demanded RM140,000 from the plaintiff. As for the counterclaim, DW2 said that the plaintiff would get 25% of the shophouses and 20% of the terrace houses meaning nine shophouses and thirteen terrace houses. In addition, there were also two bungalows which were not included in the agreement.

However, because the State Planner had disallowed the shophouses as the area was not zoned for commercial use, the nine shophouses had been replaced by nine terrace houses. DW2 also stated that since the plaintiff did not give vacant possession, the second defendant had suffered losses as they had to pay the principal, interest and other development expenses.

Under cross-examination, DW2 stated that the expenses included RM7,000 for survey fees. He also said that the said land was worth less that RM100,000 with the squatters still on it. For the twenty-two terrace houses at RM70,000 he said that the amount could be RM1,540,000 and when told that 20% of this and 20% of the two bungalows costing RM170,000 the plaintiff could get RM332,000 DW2 replied that with the squatters present, the second defendant could not even develop the land. In fact, he added that without the vacant possession, the second defendant did not even want the said land. He denied that there had been a discussion before the letter at p. 20 of Bundle B was signed by the plaintiff. He further went to explain the expenses as found in D6.

DW3 gave evidence that she had been a ground tenant of the plaintiff since 1948 and had built a house on the said land. She stopped paying rental in October 1976 as the plaintiff did not come to collect it. She produced her rental book (D7) to this effect. According to D7, the last rental paid to the plaintiff was for October 1977 for RM10 paid on 10 January 1978. After that, the plaintiff had refused to accept rental as he wanted tenants to vacate in order to develop the land. However, the plaintiff never offered her any compensation to vacate. She also said that when she wanted to cut down one coconut tree in front of her house in 1976, she had to pay the plaintiff to do so.

Similarly, another tenant (DW4) produced her rent book (D8) where the last payment of RM20 was on 20 July 1982 for June 1982. She said that after that, the plaintiff did not come to collect rentals although he did tell her to vacate the said land but made no mention of compensation.

It is abundantly clear from the facts as found by me that the plaintiff had been in breach of the joint venture agreement as he had failed to evict the squatters on the said land within six months and had failed to service the bank interest on the RM110,000 given to him. When the plaintiff realised that he could not continue with the project and being unable to pay back the loan as evidenced by his letters asking for time to pay, he had decided to transfer the said land to the second defendant. It must be emphasised that the second defendant even at the date of the hearing had stated that they were willing to return the said land to the plaintiff if he paid back all the monies due. As for the plaintiff's allegations that he had been defrauded by the conspiracy of both the defendants, it should be observed that the plaintiff's letter to transfer the said land to the second defendant had been made after the plaintiff had engaged the services of, and had obviously obtained independent advice from another firm of solicitors namely Mogan & Co. It must also be remembered that the plaintiff had earlier to this executed a sale and purchase agreement and the transfer form for an adjacent piece of land and so he cannot be said to be wholly unfamiliar with these documents. In these circumstances, certainly the plaintiff cannot expect to keep monies advanced to him, keep the said land which was incapable of being developed through his default and make the second defendant continue to service the interest indefinitely.

It is trite law that where fraud and fraudulent misrepresentation are alleged, a high standard of proof is required. This had been decidedly declared by Federal Court in *Tan Chye Chew & Anor. v. Eastern Mining and Metals Co. Ltd.* [1965] 1 MLJ 201. I could certainly find nothing in the evidence to suggest that the first defendant had fraudulently transferred the

plaintiff's land to the second defendant by causing the plaintiff to sign a document which later turned out to be a transfer document and that he together with the second defendant fraudulently induced the plaintiff to accept a variation of the original contract. This is so even considering the fact that the first defendant had acted for both the plaintiff and the second defendant in respect of the agreement and the transfer of the said land and even though he had subsequently acted for the bank to ask the plaintiff for the monies.

Non est factum had not been pleaded specifically and I am not bound to consider the plea but as it has been raised by the plaintiff in his testimony, it suffices for me to state that it is on the party establishing this plea to state that in signing the document he had acted with reasonable care. In *Saunders (Executrix of the Estate of Rose Maud Gallie - Deceased) v. Anglia Building Society (Formerly Northampton Town County Building Society)* [1970] 3 All ER 961 HL, Lord Reid had pronounced that "in general I do not think he can be heard to say that he signed in reliance on someone he trusted". As to the plaintiff's allegation that he did not understand the language of the relevant documents, it has been held in *Subramaniam v. Retnam* [1966] 1 MLJ 172 that despite the fact that the defendant was ignorant of the English language, he was bound by the written contract entered into by him in the absence of fraud or misrepresentation.

As I found that fraud had never been proved on the part of the defendants, I had dismissed the plaintiff's claim. As for the counterclaim by the defendants,since the damages have not been proved to the satisfaction of the Court and since on the facts, the said land had been transferred by the plaintiff to the second defendant as a result of the breach by the plaintiff of the agreement and accordingly the second defendant has been fully compensated by the plaintiff's breach, the Court had also dismissed the counterclaim. Since both the claim and counterclaim had been dismissed, each party is to bear their own costs.

Also found at [1991] 3 CLJ 1778